A

JHW REELS SDN BHD

v.

SYARIKAT BORCOS SHIPPING SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[ORIGINATING SUMMONS NO: 24NCC (ARB)-3-01-2012]
18 MAY 2012

C ***ARBITRATION:*** *Award - Setting aside - Application for - Leave to file application outside time limit - Reasons for delay - Whether extension could be allowed - Whether time limit prescribed under s. 37(4) Arbitration Act 2005 mandatory - Whether words "may not" in s. 37(4) to be read as "must" or "shall"*

D ***STATUTORY INTERPRETATION:*** *Construction of statutes - Intention of Parliament - Use of words "may not" as opposed to "shall" in s. 37(4) Arbitration Act 2005 - Whether mandatory or merely directory - Whether words "may not" in s. 37(4) to be read as "must" or "shall"*

E ***WORDS & PHRASES:*** *"may not" - Arbitration Act 2005, r. 37(4) - Wording of - Whether mandatory or merely directory - Whether to be read as "must" or "shall"*

F The plaintiff, *via* encl. 1, sought to set aside a partial award under s. 37(1)(b)(ii) and (2)(b) of the Arbitration Act 2005 ('the Act'). However, the application was filed outside the time limit provided under s. 37(4) of the Act and therefore, the plaintiff applied for leave to file encl. 1 beyond the 90 days prescribed under s. 37(4) G of the Act ('prayer (i)'). The plaintiff cited, *inter alia*, miscalculation of the dates, medical leave by counsel and problems with the E-filing system as the reasons for the six days delay. The plaintiff stressed on the use of the words "may not" in s. 37(4) as opposed to "shall" in contending that the leave for extension of H time should be allowed. The plaintiff also relied on the inherent jurisdiction of the High Court and para. 8 of the Schedule to the Courts of Judicature Act 1964. The plaintiff further advanced comparative cases of the English courts where an application outside the time limit was allowed provided there were cogent I reasons for the same. On the contrary, the respondent urged that a strict reading of s. 37(4) of the Act should be taken, since

essentially such a position will be consonant with the scheme of the Arbitration Act which has adopted the UNCITRAL Model Law ('Model Law').

Held (dismissing prayer (i) with costs; dismissing encl. 1 with costs):

(1) On a proper reading of s. 37(4) of the Act, it was clear that the time limit imposed is mandatory. This view accords with the generally accepted view that under the Model Law, the time limit is strict and express power must be given under the law itself before the court can extend time. This view also accords with the principle of intervention by the courts of law as strongly underlined in s. 8 of the Act and support for the strict reading can be found within the four corners of s. 37 itself. (para 19)

(2) The appearance of the words "may not" in s. 37(4) cannot reasonably be read as denoting a merely directory requirement. In the total scheme of the Act and bearing in mind the full provision of s. 37, this will be a case where "may" should be read as "must" or "shall" to effectuate the legislative intent. (*Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor* (dist)). (para 21)

(3) In light of the express wording of the statutory provisions, the court took note of the persuasive decision in *ABC Co v. XYZ Ltd* in reaching the decision in favour of a strict reading of s. 37(4) and exclusion of a power to extend time. (paras 22 & 23)

Obiter:

There could be no plausible prejudice resulting to the plaintiff since the very same issues sought to be canvassed in this application under s. 37(1)(b)(ii) and (2)(b) of the Act, had been ventilated as well in the earlier application by the defendant to register the award under ss. 38 and 39. Given the obvious overlaps between ss. 37 and 39, it would have made practical sense to have both applications heard before one court and before the same judge. At present, the application to set aside was being heard after the other court had allowed the defendant's application to register the award. To accede to the plaintiff's application here would be to allow the plaintiff to have the proverbial second bite of the cherry. (para 25)

Case(s) referred to:
ABC Co v. XYZ Ltd [2003] SGHC 107; [2003] 3 SLR(R) 546 ***(foll)***
Dato' Dr Muhammad Ridzuan Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd [2012] 6 CLJ 156 HC ***(refd)***
Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor [2012] 10 CLJ 399 HC ***(dist)***
Kalmneft v. Glencore International AG [2002] 1 All ER 76 ***(refd)***
Nagusina Naviera v. Allied Maritime Inc [2002] EWCA Civ 1147 ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 8, 37(1)(b)(ii), (2)(b), (4), (5), 38, 39, 42(2)
Courts of Judicature Act 1964, s. 25(2)
Rules of the High Court 1980, O. 92 r. 4

Arbitration Act 1996 [UK], ss. 70, 80
Civil Procedure Rules [UK], r. 62.9(1)

Other source(s) referred to:
David Altaras, *Time Limits for Appealing Against and Challenging an Arbitral Award in England and Wales*, 2008, pp 360-368

For the plaintiff - Isa Aziz Ibrahim (Darren Malis Isik with him); M/s Ranjit Ooi & Robert Low
For the defendant - Vinodhini B Samuel; M/s Ariff & Co

Reported by S Barathi

JUDGMENT

Mohamad Ariff Yusof J:

[1] Enclosure 1 is the plaintiff's application by originating summons to set aside a partial award dated 28 October 2011 under s. 37(1)(b)(ii) and (2)(b) of the Arbitration Act 2005 ('the Act'). The originating summons however has been filed outside the time limit provided under s. 37(4) of the Act. Prayer (i) in the originating summons is therefore an application to this court for leave to file the application to set aside beyond the 90 days prescribed under s. 37(4).

[2] Section 37(4) provides thus:

> (4) An application for setting aside may not be made after the expiry of 90 days from the date on which the party making the application had received award or, if request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

[3] The present application turns on the first limb of the subsection; it has been made after the expiry of 90 days from the date of receipt of the award. It appears to be common ground that the date from which the 90 days is to be calculated is the date of the award, namely 28 October 2011. The last date for filing is therefore 26 January 2012. The originating summons is filed on 31 January 2012 ie, six days late.

[4] The plaintiff's counsel has stated in the affidavit in support No. 2 that there was a miscalculation of the dates, which has also been compounded by counsel being on medical leave for the whole of December. It has also been argued that there was a further delay of one day arising from a problem with the E-filing system. See paras. 7, 8, 9, 10, 12 and 13 of the affidavit.

[5] Stress has been placed by the plaintiff's counsel on the use of the words "may not" in s. 37(4), as opposed to "shall". In contradistinction s. 42(2) is cited to illustrate the point that where the Act specifies a mandatory requirement, the word "shall" is used. This particular provision is of course in reference to "reference on questions of law" when such a reference must be filed within 42 days of the publication and receipt of the award. To this extent, it appears to be accepted that at least in the context of s. 42(2), the time limit is mandatory and rigid.

[6] Reference is made to the recent High Court decision in *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor* [2012] 10 CLJ 399; [2011] MLJU 361 to support the argument that s. 37(4) imposes a directory requirement, not a mandatory one. In particular, the view of the learned High Court Judge, as expressed in the following passage, is emphasised:

> I agree with the Plaintiff's contention that section 37(4) of the AA 2005 is directory and not mandatory, in a limited sense only. In the instant case there is 9 month delay and the grounds stated *prima facie* do not warrant the court to condone delay. The delay here is not "just delay" but I will say inordinate delay as the Plaintiff has adequate legal representation ..." (per Dr. Haji Hamid Sultan bin Abu Backer, J)

[7] I have also been referred to the decision of Lee Swee Seng J in the more recent case of *Dato' Dr Muhammad Ridzuan Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd* [2012] 6 CLJ 156 which has followed *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor*.

[8] The plaintiff alludes to the delay on the present facts as not being an inordinate delay, unlike the delay on the facts of *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd & Anor*. Based on this argument, it is submitted the plaintiff's application for leave for extension of time to file the setting aside proceeding should be allowed.

[9] The plaintiff's case relies as well on the inherent jurisdiction of the High Court under O. 92 r. 4 of the Rules of the High Court 1980, and submission has centred on the Schedule to the Courts of Judicature Act 1964 ("Additional powers of High Court"), para. 8, which reads:

> Time
>
> 8. Power to enlarge or abridge time prescribed by any written law for doing any act or taking any proceeding, although any application therefor be not made until after the expiration of the time prescribed;
>
> Provided that this provision shall be without prejudice to any written law relating to limitation.

[10] These "additional powers" stem from s. 25 of the Courts of Judicature Act, which in sub-s. (2) of that section provides:

> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule;
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

[11] By way of comparison, the approach of the English courts is advanced in argument by the plaintiff's counsel. The comparable provision in the English Arbitration Act 1996 is s. 70 with its reference to an "application" or "appeal", which "must" be brought within 28 days of, *inter alia*, the date of the award. However, the English courts have in proper cases allowed such application or appeal to be filed outside this time limit, but it appears that the courts will require cogent reasons to allow this. That this the general English approach is seen in the persuasive commentary submitted by counsel ie, David Altaras, *"Time Limits for Appealing Against and Challenging an Arbitral Award in England and Wales"* (2008) 74 Arbitration at pp. 360-368 (a publication of

the Chartered Institute of Arbitrators). The principles adopted by the English courts can be seen in cases as *Kalmneft v. Glencore International AG* [2002] 1 All ER 76 and *Nagusina Naviera v. Allied Maritime Inc* [2002] EWCA Civ 1147, which are conveniently analysed by Altaras. The factors to be considered by the court are said to include the following:

(i) The length of the delay, being an important consideration and to which the court should attach considerable weight;

(ii) Whether in permitting the time limit to expire, the guilty party acted reasonably in all the circumstances and a sensible explanation for the delay should be forthcoming; and

(iii) Whether the respondent to the application or the arbitrator contributed to the delay.

[12] These are in the main factors stated by Colman J in *Kalmneft v. Glencore International*, *supra*.

[13] The plaintiff, arguing from this premise, invites this court to likewise assume a similar power to grant an extension of time to the plaintiff.

[14] The position advanced by the respondent is to the contrary. The respondent urges that a strict reading of s. 37(4) be taken, since essentially such a position will be consonant with the scheme of our Arbitration Act 2005 which has adopted the UNCITRAL Model Law. The equivalent provision in the Model Law is art. 34(3):

> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal.

[15] The "explanatory note" to the Model Law refers to art. 5 and highlights that all instances of possible court intervention are to be found within the confines of the Model Law. See explanatory note 16. Article 5 reads:

> **Article 5. Extent of court intervention**
>
> In matters governed by this Law, no court shall intervene except where so provided in this Law.

[16] The intent and purpose of art. 5 is captured in our s. 8 of our Arbitration Act. This section previously read:

> **8. Extent of court intervention.**
>
> Unless otherwise provided, no court shall intervene in any of the matters governed by this Act.

[17] It has now been amended by the Arbitration (Amendment) Act 2011 to read:

> **Extent of court intervention**
>
> 8. No court shall intervene in matters governed by this Act, except where so provided in this Act.

[18] As for the position adopted in England, counsel for the defendant draws the court's attention to the availability of an express power under the English Arbitration Act, namely s. 80 read in conjunction with r. 62.9(1) of the CPR. This feature is indeed addressed in the commentary by Altaras:

> ... there are provisions in the Act which permit a court to extend time within which to challenge or appeal an award. Thus, by s. 80:
>
> > (5) Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement.
>
> Rule 62.9(1) of CPR provides that the court may vary the time for complying with the 28-day limit. However, in determining whether to extend the statutory limit, the court should bear in mind that the Act is based on principles of party autonomy and finality of awards. It is important that any challenge to an award be pursued without delay. The court will require cogent reasons for extending time (at p. 364).

[19] Having considered the submissions and the provisions in our Arbitration Act, I tend to be of the view that on a proper reading of s. 37(4) the time limit imposed is mandatory. This view accords with the generally accepted view that under the Model Law, the time limit is strict and express power must be given under the law itself before the court can extend time. This view also accords with the principle of minimal intervention by the courts of law as

strongly underlined in our s. 8 of the Act. Support for this strict reading can be found within the four corners of s. 37 itself. Unlike art. 34 of the Model Law which provides no exceptions, our s. 37(5) provides two exceptions:

> (5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

[20] Thus, *expressio unius est exclusio alterius*.

[21] The appearance of the words "may not" in s. 37(4) cannot reasonably be read as denoting a merely directory requirement. In the total scheme of our Arbitration Act and bearing in mind the full provision of s. 37, this will be a case where "may" should be read as "must" or "shall" to effectuate the legislative intent. To this extent, I have to say, with due respect to my learned brother judge in *Government of the Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd & Anor*, I differ in my reading of s. 37(4). I note however that even in that decision the learned judge took a very limited and narrow view of the court's power to extend time in this context. Indeed the High Court dismissed the application for leave to file the setting aside outside the time limit.

[22] In reaching this court's decision in favour of a strict reading of s. 37(4) and exclusion of a power to extend time, I have also taken note of the persuasive High Court of Singapore decision in *ABC Co v. XYZ Ltd* [2003] SGHC 107; [2003] 3 SLR(R) 546, where the court *inter alia* opined:

> The starting point ... must be the Model Law itself. On the aspect of time, art 34 (3) is brief. All that it says is that the application may not be made after the lapse of three months from a specified date. Although the words used are "may not" these must be interpreted as "cannot" as it is clear that the intention is to limit the time during which an award may be challenged. This interpretation is supported by material relating to the discussions amongst drafters of the Model Law. It appears to me that the court would not be able to entertain any application lodged after the expiry of the three-month period as art 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court. It does not provide for any extension of the time period and as the court derives its jurisdiction to hear the application from the article alone, the absence of such a provision means the court has not been conferred with the power to extend time (per Judith Prakash J at page 550 of the report).

[23] I do not see why the Malaysian approach to the same broad issue should be any different, particularly in light of the express wording of our own statutory provision which I have alluded to earlier.

[24] In these circumstances, the application of the plaintiff in prayer (i) must stand dismissed with costs. Consequently, the entire application in encl. 1 must also stand dismissed with costs.

[25] In passing it is pertinent to note that there could be no plausible prejudice resulting to the plaintiff since the very same issues now sought to be canvassed in this application under s. 37(1)(b)(ii) and (2)(b) of the Arbitration Act 2005, have been ventilated as well in the earlier application by the defendant to register the award under ss. 38 and 39. Given the obvious overlaps between s. 37 and s. 39, it would have made practical sense to have both applications heard before one court and before the same judge. As it now stands, the application to set aside is being heard after the other court has allowed the defendant's application to register the award. To accede to the plaintiff's application here will be to allow the plaintiff to have the proverbial second bite of the cherry.